IN THE SUPREME COURT OF FLORIDA

HECTOR FUENTE

Appellant

vs.

THE STATE OF FLORIDA

Appellee

Case No. 69,196

REPLY BRIEF OF APPELLANT

SIMSON UNTERBERGER, ESQUIRE
Suite 1602, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE

STATUTES

RULES PAGE

ARGUMENT (FIRST) UPON ISSUE I

Appellee's response of Appellant's Argument (First) Upon Issue I seems to be multifaceted.

One facet is the contention that the Appellee's failure to try Appellant upon the Indictment (1900-1901) within 180 days as set forth in Chapter 941.45 (3)(a) Florida Statutes is easily disposed of by Appellee's representation to the trial court that the federal authorities, who had Appellant incarcerated at the time he concededly complied with Chapter 941.45(3)(a) Florida Statutes by requesting final disposition, refused to deliver Appellant for trial because of Appellant's physical condition. This contention of Appellee is fraught with an insurmountable problem.

The problem arises from the fact that once Appellant requested final disposition as per the Interstate Agreement on Detainers ("Agreement"), Chapter 941.45 et seq. Florida Statutes, it devolved upon federal and state authorities to effectuate Appellant's return to Florida for trial. This return apparently did not occur because federal authorities (initially) refused to deliver Appellant to Appellee for trial. Does this refusal excuse Appellee's failure to try Appellant within the aforementioned 180 days? The answer is in the negative because the 180 day requirement is tolled only when an accused is "unable to stand trial" as determined, not by federal prison officials, but "as

determined by the court having jurisdiction of the matter." Chapter 941.45(6)(a) Florida Statutes. When Appellee was (initially) told by the federal authorities that they would not return Appellant for trial, despite his due request for final disposition, it became incumbent upon Appellee to seek a judicial determination that the 180 day period should be tolled because of Appellant's purported inability to stand trial. Chapter 941.45(6)(a) Florida Statutes. Appellee never sought such a judicial determination. Nor did Appellee seek Appellant's return to Florida for trial by any other method, device, procedure, or proceeding. Therefore, since courts, not jailers, decide whether the statutory right of an accused to be tried within said 180 day period should be tolled, Appellee is precluded from excusing its failure to timely try Appellant because of a jailer's determination that Appellant was unable to stand trial.

A second facet of Appellee's aforementioned response is the thought that somehow Appellant's failure himself to take action to expedite his return to Florida after his request for final disposition excuses the failure to try Appellant within the statutorily mandated 180 day period. Suffice it to say that this thought is ludicrous in view of the duties imposed upon sending and receiving states by the Agreement once final disposition has been duly requested and the legal requirement, under the facts of the case at hand, that Appellee should have been required to

"chase" Appellant in an effort to avoid expiration of the 180 day period, State v. Roberts, 427 So.2d 787 (Fla. 2d DCA 1983), especially in view of Appellant's request for final disposition and the (initial) refusal, known to Appellee, of federal authorities to deliver Appellant in accordance with law.

Both the federal government and the State of Florida are full partners in the Agreement, U. S. v. Mauro, 544 F.2d 588 (5th Cir. 1976). By enacting Chapter 941.45 et seq., Florida Statutes, Florida chose to contract and agree with other jurisdictions to the Agreement's terms, conditions and provisions. Appellant, as a beneficiary of certain rights granted him by the Agreement complied therewith. However, neither the federal government nor Appellee complied therewith and to further compound Appellee's position, it further failed to avail itself of any procedure provided by the Agreement in an effort to avoid the effect of the federal government's failure to comply with and/or refusal to deliver, or to otherwise take any action to secure the compliance of the federal government with the Agreement or require it to deliver Appellant for trial. It is not Appellant's fault that he was not tried within the 180 day period or that the period was not tolled. It is the fault of government, federal and state, that he was not so tried or the period tolled and that, as a consequence thereof, the policy and purpose of the Agreement went unfulfilled in this case. Chapter 941.45 Florida Statutes.

Since Appellee's response to the Issue which is the subject of this portion of Appellant's reply brief neither addresses the facts pertaining to Appellant's physical condition nor attempts to rebut or refute Appellant's view that they do not substantiate an inability to stand trial, Appellant, as to the merits of his Motion for Discharge **(2012-2017)** will stand upon his Argument (First) Upon Issue I contained in his Initial Brief in this appellate proceeding.

As an aside to all of the foregoing, Appellant notes a reference in Appellee's Brief to a Motion for Temporary Restraining Order **(2397-2399)** which was filed in the U. S. District Court for the Western District of Tennessee. Though Appellant is unable to discern what inference Appellee suggests be drawn from the filing of this Motion, the reality is that no inference is drawable therefrom for the following reasons:

(a) It is undisputed that Appellant was returned to Florida for trial on December 8, **1985 (1517).**

(b) The Motion for Temporary Restraining Order **(2397-2399)** was filed **on** December 13, **1985,** (subsequent to Appellant's return to Florida as aforesaid) as noted in the footnote to the Order Denying Motion for Temporary Restraining Order **(2411-2412).**

(c) The Motion for Temporary Restraining Order **(2397-2399)** was denied on December 19, **1985 (2411-2412).**

(d) By his due request for final disposition, Appellant waived extradition. Chapter 941.45(3)(e) Florida Statues.

ARGUMENT (SECOND) UPON ISSUE I

Appellee's response to Appellant's Argument (Second) Upon Issue I contains the following invalid points.

One such point is the assertion that the trial court took judicial notice of certain medical records, not the subject of the depositions taken in California upon the merits of Appellant's Motion for Discharge (2012-2017), which Appellee presented to the trial court at the hearing of April 29, 1986, upon the motion. Appellant has examined the record in this case and finds no indication that the trial court took judicial notice of such records. Even had the trial court taken judicial notice of same as official action of a department of government as suggested by Appellee, pursuant to Chapter 90.202(5) Florida Statutes, such would have been error for the following reasons, to-wit:

(a) Official actions consist of things such as executive orders and official reports and records filed with the secretary of state (see Sponsors' Note to Chapter 90.202 Florida Statutes) and medical records clearly do not qualify.

(b) Judicial notice of matters described in Chapter 90.202 Florida Statutes can only be taken when requested by a party as per Chapter 90.203(1) and (2) Florida Statutes and no such request by Appellee appears in the record of this case.

Another such point is the assertion that, at the hearing of April 29, 1986 (1775-1802) upon the Motion for Discharge (2012-2017) Appellant was not precluded from presenting evidence in support of the Motion. For the invalidity of this assertion, Appellant will rely upon the clear demonstration contained in his initial Brief that not only was he so precluded but that Appellee was able to do so in violation of innumerable rules of evidence and procedure.

ARGUMENT UPON ISSUE II

In Appellant's view, Appellee's relegation of the matter, which is the subject of Issue II, to a question of legal ethics is tantamount to Appellee's admission that Appellant's position on the question of perjured testimony is significant. Such a relegation by Appellee reveals its lack of appreciation for the concepts that:

(a) Criminal convictions obtained through the use of perjured testimony are fundamentally unfair, impure and tainted. Pyle v. Kansas, 317 U. S. 213, 63 S. Ct. 177, 87 L. Ed. 2d 214 (1942); U. S. v. Arguis, 427 U. S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); Dodd v. The Florida Bar, 118 So.2d 17 (Fla. 1960).

(b) Prosecutors are dutibound not to rely on perjured testimony and, when such is presented, are obligated to make same known to the court and the defense and to otherwise take corrective action. Giglio v. U. S., 405 U. S. 150, 92 S. Ct. 763,

31 L. Ed. 2d 104 (1972); Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976).

Perhaps it is the presence in our law of these lofty concepts of due process and fundamental fairness that explains Appellee's obvious reluctance to address, in its argument upon the perjured testimony issue:

(a) Appellee's joinder in the efforts of Barbara Jean Wright to avoid testifying as a defense witness, and,

(b) Appellee's indirect admission, evident from its claim that the killing was a contract murder (made in an effort to secure a jury death sentence recommendation), that Barbara Alfonso lied when she contradicted Ralph Salerno's testimony that she offered $2,500.00 to $5,000.00 to have her husband killed.

The Appellee's action referred to in (b) immediately above crystallizes the point to the hardness of a diamond since there can be no excuse for a prosecutor urging for the purpose of conviction that its witnesses' testimony is credible and then, for the purpose of penalty, urging that one witnesses' testimony on a particular significant point be believed and that of another be disbelieved on the same point. It must be remembered that it was during the first phase of trial that Ralph Salerno testified that Barbara Alfonso offered to pay money to have her husband killed and that Barbara Alfonso denied same. And, of course, both of these witnesses testified for Appellee.

When the foregoing joinder and admission are considered in conjunction with the plethora of contradictions and inconsistencies described in detail in Appellant's initial Brief, it is evident that Appellee's conduct has resulted in Appellant's conviction suffering from the aforementioned unfairness, impurity and taint so that his Motion to Dismiss for prosecutorial misconduct (the presentation of perjured testimony) should have been granted.

ARGUMENT UPON ISSUE III

The weakness of Appellee's argument with regard to Issue III is apparent from its failure, in its Brief, to substantively address the following aspects of Appellant's argument upon the issue, to-wit:

(a) That from the evidence the jury could have easily concluded that persons (Ralph Salerno and Barbara Alfonso) equally as culpable, as aiders and abettors, as Appellant received the ultimate leniency, to-wit: immunity from prosecution for first degree murder.

(b) That the evidence is undisputed that Appellant was a good father to his children.

(c) The jury manifested concern as to whether or not Appellant was the actual perpetrator of the offense with which he was charged.

The foregoing were not treated as mitigating circumstances by the

death sentencing judge who found only one mitigating circumstance, to-wit: that Appellant had saved a life. However, when (a), (b), and (c) above, each of which has been found to be an appropriate matter for jury consideration in recommending a life sentence in a capital case - Entzy v. State, 458 So.2d 755 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Jacobs v. State, 396 So.2d 713 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Malloy v. State, 382 So.2d 1190 (Fla. 1979) - are considered along with the one mitigating circumstance found by the trial court and then weighed against even all three of the circumstances deemed aggravating by the trial court, it is obvious that reasonable people could have differed, in this case, over whether death was the appropriate penalty. Tedder v. State, 322 So.2d 908 (Fla. 1975). As stated in Shue v. State, 366 So.2d 387 (Fla. 1978):

> A jury recommendation is to receive great deference, both from the sentencing judge and the reviewing appellate court."

And, in the case at hand, as in Shue v. State supra, especially in view of the factors directly addressed by Appellant and sidestepped by Appellee, Appellant urges that:

> "It is impossible to say that there was no reasonable basis for the jury to have concluded that some mitigating circumstances existed sufficient to outweigh the aggravating circumstances." Shue v. State, supra.

ARGUMENT UPON ISSUE V

Appellant desired to use Barbara Jean Wright as a defense

witness and indeed served her with a subpoena for trial (1842-1843). However, through her attorney, Wright advised Appellant that, if she were called as a defense witness, she would refuse to testify by claiming her privilege against self incrimination (1843). This advice, in view of the Rules (noted in Appellee's Brief) precluding the calling of witnesses when it is known that they will invoke said privilege, Apfel v. State, 429 So.2d 85 (Fla. 5th DCA 1983) and Faver v. State, 393 So.2d 49 (Fla. 4th DCA 1981), generated Appellant's effort to have an advance-of-trial judicial determination as to whether or not Wright could so assert the privilege. This effort resulted in the trial court sustaining Wright's position upon her claim that her trial testimony might subject her to prosecution for (a) accessory after the fact and/or (b) perjury because her trial testimony would conflict with that of Appellee's witness, Barbara Alfonso.

Appellee's failure to address Wright's claim insofar as it involves potential prosecution for perjury is the obvious product of the law, supportive only of Appellant's position, that the privilege, in such circumstances, is unavailable. The Florida Bar v. Doe, 384 So.2d 30 (Fla. 1980); U. s. v. Prior, 381 F. Supp. 870 (USDC, M.D., Fla. 1974). It is the legal proposition announced in these cited opinions which renders the trial court's decision that Wright need not testify for Appellant because of fear of a perjury prosecution clearly erroneous with the consequent effect that

Appellant was denied his constitutional right of compulsory process. Art. 1, Section 16, Fla. Const.; 6th *Am.*, U. S. Const.

In its Brief, Appellee assiduously avoids confronting the obligations imposed upon the trial court and Appellee by State v. Montgomery, 467 So.2d 387 (Fla. 3d DCA 1985) when, as in the case at hand, a distortion of the truth finding process inhered in Appellee's refusal to grant immunity to the privilege - asserting Wright who was concededly uninvolved in the murder at issue while providing same to one person (Ralph Salerno) who admitted participation in the crime and another person (Barbara Alfonso) about whom it could have easily been inferred was an aider and abettor in the crime. Because of this avoidance by Appellee, which inferentially gives added weight to his position, Appellant will rely upon its Argument Upon Issue V and reassert his contention that the trial court's failure to enter a judgment of acquittal due to Appellee's refusal to grant immunity to Wright was error.

So that he may not be accused of avoiding an apparently significant matter raised by his adversary, Appellant feels compelled to rebut Appellee's suggestion that the effect of his obstructed effort to present Wright as his witness could have been avoided by the simple expedient of using her deposition in lieu of her live testimony. Such suggestion is unsupported by law for the following reasons.

Chapter 90.804(2)(a) Florida Statutes is an exception to the hearsay rule and permits a witness to testify to the out-of-court statement of one exempted from testifyiny because of a privilege (e.g., privilege against self incrimination). However, such does not permit the use of the exempted witness' deposition testimony because in criminal cases:

(a) Deposition testimony is admissible if perpetuated in accordance with Rule 3.190(j)(1) Fla. R.Civ.P. (and if otherwise in accordance with the Florida Evidence Code), which is not the case with Wright's deposition testimony.

(b) Deposition testimony is useable or readable in evidence when the witness's attendance at trial is not procurable, Rule 3.190(j)(6) Fla.R.Civ.P., procurability referring solely to the ability of the party to have the witness present at trial, Pope v. State, 441 So.2d 1073 (Fla. 1983); Palmieri v. State, 411 So.2d 985 (Fla. 3d DCA 1982), which is not the situation here since Appellant had a trial subpoena served on Wright who appeared in the case by counsel.

From the immediately preceding discussion, it is clear that Wright's deposition testimony was unavailable to Appellant for use or reading into evidence at trial.

ARGUMENT UPON ISSUE IX

In its Argument Upon Issue IX, Appellant demonstrated that the mistrial in this cause afforded Appellee a more favorable

opportunity for convicting Appellant in that, at the retrial, Appellee was able to introduce into evidence a tape recording containing statements inculpating Appellant which, on the state of the record at the time of mistrial, Appellee would not have been able to use in that trial. Retrials after mistrials which result in the affording of such an opportunity are barred on double jeopardy grounds. U. S. v. Dinitz, 424 U. S. 600, 96 S. Ct. 1075, 47 L. Ed. 2d 267 (1975); U. S. v. Beasley, 479 F.2d 1124 (5th Cir. 1973). Appellee discounts the proposition that the mistrial afforded Appellee the aforementioned opportunity by claiming that the (mis)trial "testimony of Salerno had established beyond and to the exclusion of any reasonable doubt that Hector Fuente's craven heart had the premeditated intent to kill Enrique Alfonso" (p. 43 of Appellee's Brief). Of course, such a tact begs the question of whether the mistrial afforded Appellee a more favorable opportunity as aforesaid since it fails to account for the fact that Appellee used the tape recording in the retrial and obviously felt a need to do so.

It cannot be reasonably advocated that the incriminating contents of the tape recording introduced into evidence in the retrial did not provide Appellee with significant additional ammunition against Appellant which, for whatever reason, it chose not to use or attempt to use during the trial which culminated in a mistrial. It is this additional advantage gained solely by

virtue of a mistrial granted exclusively as the result of a question propounded by and an answer elicted by Appellee which generated the valid double jeopardy position posited by Appellant in these proceedings.

CONCLUSION

To the extent that Appellant has not addressed herein certain points and arguments contained in Appellee's Brief, such should not be construed as a concession of the correctness thereof but instead signifies Appellant's view that Appellee's position is patently invalid and unworthy of response by Appellant who, on the particular subject, stands upon argument appearing in his initial Brief.

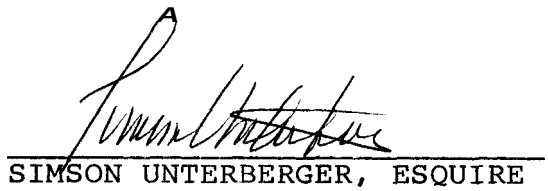
Respectfully submitted,

SIMSON UNTERBERGER, ESQUIRE
Suite 1602, One Mack Center
501 East Kennedy Boulevard
Tampa, Florida 33602
(813) 229-8548
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished, by mail, this 27th day of February, 1987, to William I. Munsey, Jr., Esquire, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park

Trammell Building, Tampa, Florida 33602, Counsel for Appellee.



SIMSON UNTERBERGER, ESQUIRE